



APPENDIX A.

Federal Trade Commission Act, 1914.

(38 Stat. 717, 719.)

(Emphasis and paragraph numbering supplied and notes added.)

Sec. 5. (1) That unfair methods of competition in commerce are hereby declared unlawful.

(2) The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

(3) Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using *any unfair method of competition*¹ in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such

¹Note. At this point, the 1938 amendment inserted "*or deceptive acts or practices*"; and following the last (11th) section of the 1914 Act, added 7 new sections (12-17). (15 U. S. C. A. 45-58.) Section 5, *supra*, was divided into 12 subsections incorporating some changes and additions. (*Id.*, sec. 45 (a)-(1).) The insertion noted is in subsection (b). *New section 12* (*Id.*, sec. 52) provided:

"Sec. 12(a) *It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—*

(1) By United States mails, or *in commerce by any means*, for the purpose of inducing, or which is likely to induce, directly or indirectly the *purchase* of food, *drugs*, devices or cosmetics; or

(115) (2) By *any means*, for the *purpose of inducing*, or which is likely to induce, directly or indirectly, the *purchase* in commerce of food, *drugs*, devices or cosmetics.

person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the *violation* of the law *so charged in said complaint*. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, *it shall make a report in writing in which it shall state its findings as to the facts*, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of com-

(b) *The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5."*

The authority for, and the extent of the court's jurisdiction of, actions by the Government on orders of the Commission, is each conferred by *new* subsection (1) of Section 5, supplemented by *new* Section 16, which latter authorizes the Attorney General to proceed, upon certification of "the facts" by the Commission. (*Id.*, Secs. 45 (1) and 56.) Subsection 45 (1) is quoted in the Government's brief, p. 3. The expressed limitation of both the authority for and the jurisdiction of such an action, on such an order, is:

"after it has become final, and while such order is in effect".
(*Id.*, 45 (1).)

petition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

(4) If such person, partnership, or corporation *fails or neglects* to obey such order of the commission while the same is in effect, the *commission* may apply to the *circuit court* of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the *enforcement of its order*, and shall certify and *file* with its application a *transcript of the entire record* in the proceeding, including *all the testimony* taken and the report and order of the commission.² Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. *The find-*

²Note. Subsection (1) was added at the end of original Section 5.

With new Section 16, it replaced this provision (par. (4)) of the original Act, for "*enforcement*" of orders. The provisions of the remainder of this paragraph and of the succeeding (5), relating to "*review*" and to the *finality* of orders, are replaced in new subsections of Section 5. (15 U. S. C. A. sec. 45 (b), (c), (g).) In particular, subsection (g), (1), makes the Commission's orders "*final*", *inter alia*, if there is no "*review*" within "*the time allowed*".

ings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceedings before the commission, the court may order such additional evidence to be taken before the commission, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The *judgment* and decree of the *court* shall be *final*, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

(5) *Any party* required by such order of the commission to cease and desist from using such method of competition may *obtain a review* of such order in said *circuit court* of appeals by filing in the court a written *petition* praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the *commission* forthwith shall certify and *file* in the court a *transcript* of

the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the *findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.*

(6) The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

(7) Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

APPENDIX B.

Analysis of the Alleged False Advertising as It Is Made to Appear in the Successive Stages of the Commission's Proceeding, and a Comparison with New Advertisements Relied on in the Government's Complaint.

Commission's Complaint:

- "(1) Said 'Glendage' is a gland tonic; (11)
- (2) Said 'Glendage' restores vigorous health;
- (3) Said 'Glendage' is the best gland remedy known;
- (4) Said 'Glendage' constitutes a remedy for glands;
- (5) Said 'Glendage' is the last word in modern science;
- (6) Said 'Glendage' stimulates all the glands to healthy activity;
- (7) Said 'Glendage' is entirely unlike other so-called gland remedies;
- (8) Said 'Glendage' stands superior to a tonic;
- (9) Said 'Glendage' is a wonderful remedy for cases of nervousness or overwork, or lack of vim, or lack of vigor; and
- (10) Said 'Glendage' will return one to the full vigor of manhood or womanhood,". [Tr. 12-13.]

Commission's Findings:

"Paragraph Four." "It is represented and implied:

- (1) "*that* the said preparation Glendage is a gland tonic;
- (2) *that* it will restore vigorous health;
- (3) *that* it is the best gland remedy known;
- (4) *that* it constitutes a remedy for glands;

(5) *that* it is the last word in 'modern science' in *gland remedies* and stimulates all of the glands to healthy activity;

(6) *that* it is entirely unlike other so-called gland remedies;

(7) *that* it stands superior to all other tonics as a tonic;

(8) *that* it is a remedy for cases of nervousness, overwork, lack of vim and lack of vigor;

(9) *that* it will return one who does not possess the full vigor of manhood or womanhood to such a state;

(10) *and that such preparation Glendage is a competent and effective treatment or corrective for use in remedying the ailments and conditions mentioned. (24.)*"

[Tr. 25.] (The numbering above appearing is supplied.)
(Emphasis supplied.)

Commission's Order:

"1. That said preparation is a gland tonic;

2. That said preparation will restore vigorous health;

3. That said preparation is the best gland remedy known;

4. That said preparation constitutes a remedy for glands;

5. That said preparation is the "last word" in "modern science" in *gland remedies*, and stimulates all the glands to healthy activity;

6. That said preparation is entirely unlike other so-called gland remedies;

7. That said preparation stands superior as a tonic;

8. That said preparation is a remedy for cases of nervousness, overwork, lack of vim and lack of vigor;

'9. That said preparation will return one to the full vigor of manhood or womanhood;

'10. *That said preparation is a competent and effective treatment or corrective for use in remedying the ailments and conditions hereinabove mentioned.*' (5)" [Tr. 5-6.] (Emphasis supplied.)

New Advertisements in the Government's complaint:

"Money-Back

Gland Tablet

Calls for Trial

"Every cent will be refunded if results from Glendage are unsatisfactory. That's how sure we are that we have *one of the best gland tablets known*. Thousands of tests have proven this to our full satisfaction. You, too, may prove it without risking a penny.

"Glendage, in convenient tablet form, is the private prescription of Jos. A. Piuma, Graduate Pharmacist. It contains the extracts from the glands of healthy animals (7) and its purpose is *to help stimulate* all the glands to healthy activity. You will be surprised at its *invigorating action*. Vigorous health is necessary for success in all activity today.

"*Asthma, Diabetes, Rheumatism, Constant Tiredness, Low Blood Pressure, Prostate Gland Trouble, Nervousness and others are ailments frequently caused by gland disorders.*

"You owe it to yourself and family to try this *new gland tablet*. It is a *real gland product* and carries an un-

limited money-back guarantee if it does not give complete satisfaction. 30-day treatment, \$3.00." [Tr. 8-9.]

The parts constituting *representations* are *italicized*.

It is at once obvious that Nos. 5 and 10 in the Findings and Order *depart* from those charged in the Commission's Complaint. The new 5 consists of original 5 and 6, with "*in gland remedies*" interpolated between. No. 10, being thus vacated, is supplied by *wholly new matter*. (Pet. 8-9.)

Comparison:

The Commission made special findings. [Tr. 21-23.] These with cited matters show it contained *glandular* substances sufficient to entitle it to rate as a *tonic* to at least *some extent*, and any purported finding otherwise is mere matter of the Commission's *opinion*. Hence, *such* representation could neither be false, nor be denied to appellant. (Pet. 9.) Bearing this in mind, each numbered item in the *Commission's complaint* will be compared with what was published in 1938, 1939 and 1940, reproduced in full, *supra*. What is stated in the "*Order*" in the present Government's complaint [Tr. 5-6], appears wholly immaterial; since its *departure* from the original charge is shown,—also on the face of *Government's* complaint,—by the exhibited complaint of the *Commission*. [Tr. 12-13.] The result is this:

1. "*a gland tonic*".

This, as above, the Commission itself showed,—by its own special findings of content,—could not be validly forbidden, since the preparation was "*a gland tonic*",—

by its content of glandular substances, and its indeterminate potential as "a tonic". "Gland tablet" is its equivalent.

2. *"restores vigorous health"*.

This appears only as *"help to stimulate"*, which is true for the reasons just stated.

3. *"the best gland remedy known"*.

This appears only as *"one of the best"*, thus not excluding any others; and merely "puffing" the preparation, which, by common knowledge, even now is the universal practice, particularly in this field of endeavor.

4. *"constitutes a remedy for glands"*.

This is proper and admissible for the reasons appearing under 1, *supra*.

5. *"the last word in modern science"*.

This is *wholly omitted*.

6. *"stimulates all the glands to healthy activity"*.

This is changed to *"helps to stimulate"*, which is admissible for the reasons appearing under number 1.

7. *"is entirely unlike other so-called gland remedies"*.

This is *entirely omitted*.

8. *"stands superior to a tonic"*.

This is *entirely omitted*.

9. *"a wonderful remedy for nervousness or overwork, or lack of vigor"*.

This is *wholly omitted*. Its only approach lies in the statement that a number of "ailments", headed by "*Asthma*", and ending with "*Nervousness*", are *frequently caused by gland disorders*".

At least some of the diseases, *e. g.*, "*asthma*", are *directly* within the terms of United States Dispensatory (1937 Ed.). See Appendix C, post.

10. "*will return one to the full vigor of manhood or womanhood.*"

This is *wholly omitted*.

Resulting from this comparison, the new advertisements in question show *no violation* of the order, *provided only* it still remains true, that the appellant's preparation is what the Commission's special findings indicate it to be: a tonic, of at least some valuable potency. Based upon this state of therapeutic fact, derivable mostly from experience, all the other statements appearing are but legitimate and common "puffing", make no fantastic claims, and make no invidious comparisons with any other preparation or remedy. The *full truth* of this *fact issue* remained to be *tried out* in full; and the summary judgment precluded any such.

APPENDIX C.

United States Dispensatory, 1937 Edition, p. 1113.

"The thyroid gland is one of those organs, called endocrine, which furnish an internal secretion necessary for the *health of the body*. * * * The administration of the thyroid body or its active principle to healthy animals causes an increase in the *metabolism* with consequent tendency for elevation of the temperature, and a loss of body weight. * * * *In addition* to these states in which the drug is obviously of value, it has been used in a more or less empiric manner in *a large number of other disorders*. There are *indeed few* diseases, either acute or chronic, for which the thyroid gland has not been recommended by someone. Among these conditions in which there is more or less suggestive evidence of its usefulness may be mentioned uterine disorders, especially metorrhagia; various forms of nephrosis (see McClendon, J. A. M. A., 1930 XCIV, 1202); diseases of the bones as ununited fractures, osteomalacia, and theumatoid arthritis, certain skin diseases, especially psoriasis; *hay fever, asthma, etc.* * * *"

